85-1363

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TIMOTHY V. O'MAHONY,

Petitioner,

v.

CHICAGO TRANSIT AUTHORITY,
a municipal corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's Fourteenth Amendment "liberty" interest should prevail when there is a split amongst the federal courts of appeal as to the stigmatizing character of charges of incompetence that were raised at the time of petitioner's dismissal.

2. Whether petitioner's Fourteenth Amendment "property" interest in continued employment can be abrogated by state statute.

3. Whether petitioner has a right to sue in federal court under section 13(c) of the Urban Mass Transportation Act of 1964 as amended when there are no state remedies of federal administrative remedies available.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Timothy V. O'Mahony respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on November 15, 1985.

OPINION BELOW

The Court of Appeals entered its decision (Appendix "A") that the judgment of the United States District Court for the Northern District of Illinois, in this action

appealed from, be affirmed for the reasons set forth in the District Court's "Order" of August 30, 1983 (Appendix "B") and "Memorandum Opinion" of March 12, 1985 (Appendix "C"), said opinions appended to the judgment of the Court of Appeals; and for an additional reason cited in said judgment.

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals on November 15, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No person shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Illinois Revised Statutes, Chapter 111⅔, Section 327

The Board may appoint an Executive Director who shall be a person of recognized ability and experience in the operation of transportation systems to hold office during the pleasure of the Board. The Executive Director shall have management of the properties and business of the Authority and the employees thereof, subject to the general control of the Board, shall direct the enforcement of all ordinances, resolutions, rules and regulations of the Board, and shall perform such other duties as may be prescribed from time to time by the Board. The Board may appoint a General Attorney and a Chief Engineer, and shall provide for the appointment of other officers, attorneys, engineers, consultants, agents and employees as may be necessary for the construction, extension, operation, maintenance, and policing of its properties. It shall define their duties and require bonds of such of them as the Board may designate. The Executive Director, General Attorney, Chief Engineer, and all other officers pro-

vided for pursuant to this section shall be exempt from taking and subscribing any oath of office. The compensation of the Executive Director, General Attorney, Chief Engineer, and all other officers, attorneys, consultants, agents, and employees shall be fixed by the Board.

In the policing of its properties the Board may provide for the appointment and maintenance, from time to time, of such police force as it may find necessary and practicable to aid and supplement the police forces of any municipality in the protection of its property and the protection of the persons and property of its passengers and employees, or otherwise in furtherance of the purposes for which such Authority was organized. The members of such police force shall have and exercise like police powers to those conferred upon the police of cities.

Illinois Revised Statutes, Chapter 111⅔, Section 328

The Board shall classify all the offices, positions and grades of regular employment required, excepting that of the Chairman of the Board, the Executive Director, Secretary, Treasurer, General Attorney, and Chief Engineer, with reference to the duties thereof and the compensation fixed therefor, and adopt rules governing appointments to any of such offices or positions on the basis of merit and efficiency. No discrimination shall be made in any appointment or promotion because of race, creed, color, sex, national origin, physical or mental handicap unrelated to ability, or political or religious affiliations. No officer or employee shall be discharged or demoted except for cause which is detrimental to the service. Any officer or employee who is discharged or demoted may file a complaint in writing with the Board within ten days after notice of his or her discharge to demotion. If an employee is a member of a labor organization the complaint may be filed by such organization for and in behalf of such employee. The Board shall grant a hearing on such complaint within thirty (30) days after it is filed. The time

and place of the hearing shall be fixed by the Board and due notice thereof given to the complainant, the labor organization by or through which the complaint was filed and the Executive Director. The hearing shall be conducted by the Board, or any member thereof or any officers' committee or employees' committee appointed by the Board. The complainant may be represented by counsel. If the Board finds, or approves a finding of the member or committee appointed by the Board, that the complainant has been unjustly discharged or demoted, he or she shall be restored to his or her office or position with back pay. The decision of the Board shall be final and not subject to review. The Board may abolish any office or reduce the force of employees for lack of work or lack of funds, but in so doing the officer or employee with the shortest service record in the class and grade to which he or she belongs shall be first released from service and shall be reinstated in order of seniority when additional force of employees is required. Seniority shall be considered a working condition and where employees are represented by a labor organization which has any labor agreement with the Authority such working conditions shall be governed by the terms of such agreement.

United States Code, Title 49, Section 13(c)

It shall be a condition of any assistance under Section 3 of this act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their pensions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees

terminated or laid off; (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

STATEMENT OF THE CASE

Petitioner was discharged on September 29, 1981 from his position as a security officer in the security department of the Chicago Transit Authority (hereinafter "CTA"), a municipal corporation formed and operated under the Illinois Metropolitan Transit Authority Act, Ill. Rev. Stat., Ch. 111⅔, section 301 *et seq.* (1984). This discharge was accomplished without a pretermination hearing or substantive post-termination hearing that would establish its basis and afford the petitioner an opportunity to refute the same.

Petitioner's discharge was accompanied by publicized charges of incompetence in providing security and which intimated ease in committing thefts at the CTA's primary money counting facility. Further charges alleged incompetence in the failure to provide security to prevent the theft and sale of CTA transfers, the sale and use of drugs on CTA facilities, and theft of CTA supplies and equipment. These charges were made by members of the CTA Board, the Mayor and Police Superintendent of the City of Chicago, and their subordinate administrators.

Petitioner was represented in a collective bargaining agreement with the CTA and in a 13(c) Agreement to which the CTA was a party by Division 241, Amalgamated Transit Union located in Chicago, Illinois (hereinafter "Div. 241").

Several weeks after the petitioner was discharged the CTA informed him that the discharge was due to the "discontinuance" of the entire CTA security department for economic reasons.

At the time of the petitioner's discharge the CTA had received at least 15 federal grants under provisions of the Urban Mass Transportation Act of 1964 as amended.

Basis For Federal Jurisdiction

Petitioner initiated a complaint in the court of the first instance, the U.S. District Court for the Northern District of Illinois, which sought relief under 42 U.S.C. section 1983 for deprivation of his civil rights under color of law.

Petitioner additionally sought relief in the District Court under 49 U.S.C. section 13(c) for violations by the CTA of the petitioner's federal rights to employee protection provisions contained in the Urban Mass Transportation Act of 1964 as amended.

Jurisdiction in the court of the first instance was founded on 28 U.S.C. section 1331.

ARGUMENT

I.

THIS COURT'S SUPERVISORY POWER IS NECESSARILY INVOKED WHEN A SPLIT OF AUTHORITY AMONGST THE FEDERAL COURTS OF APPEAL AS TO THE STIGMATIZING CHARACTER OF CHARGES OF INCOMPETENCY ACTS TO DEPRIVE PETITIONER OF HIS CONSTITUTIONALLY PROTECTED "LIBERTY" INTEREST.

Petitioner's liberty claim for redress turns squarely on whether public charges of incompetency, in conjunction with the equally well-publicized theft of passenger fares, transfers, the sale of drugs and transfers from and about his employer's property, constitutes a stigma to his name and reputation as to infringe his protected interest. It is respectfully submitted that such constitutional protection is afforded petitioner's immediate interest.

The source of petitioner's claim has, of course, evolved from the Fourteenth Amendment, 42 U.S.C. § 1983, and subsequent decisions of this Court delineating the proper bounds of an individual's protected liberty interest. This Court has not passed, however, on the stigmatizing character of incompetency charges in circumstances that are presented here.

Board of Regents v. Roth, 408 U.S. 564 (1972) enunciated the principle that a deprivation of liberty would occasion a charge against the individual which might "seriously damage his standing and associations in his community" or that "foreclosed his freedom to take advantage of other employment opportunities." (408 U.S. at 573) With respect to the former, this Court offered dishonesty and immorality as *examples* of the kind of charges that would impart a stigma to the individual, but notably not as a limitation.

This Court further refined the proper setting for a deprivation of liberty consequent a stigmatizing charge in *Paul v. Davis*, 424 U.S. 693 (1976). *Paul* correctly suggests that damage to reputation alone, without an attendant alteration of a tangible interest such as employment, amounts to nothing more than defamatory conduct capable of redress at state law. Significantly, this Court in *Paul* commented favorably on its earlier decision in *Roth* that found a liberty interest where defamation *was* accompanied by discharge, as was the case with petitioner,

> ". . . *Roth* recognized that governmental action defaming an individual in the course of declining to rehire him could entitle the person to notice and an opportunity to be heard as to the defmation (sic) . . ." (424 U.S. 693, 709)

Petitioner plainly meets the criteria established by the foregoing cases of this Court. His standing in the community was irreversibly altered by the charges of incompetency raised in conjunction with the theft of equipment, passenger fares and transfers, and sale of drugs on his employer's property; he was discharged as a result of these charges; and he has been foreclosed from employment opportunities of equal stature and pay since the time of his discharge. In addition, these charges were prominently printed in major Chicago newspapers (Appendix "D" & "E") (*Bishop v. Wood*, 426 U.S. 341 (1976)); and they were false (*Codd v. Velger*, 429 U.S. 624 (1977)).

Although petitioner has fully satisfied this Court's requirements, the Seventh Circuit has seen fit to impose a further stricture on petitioner's liberty interest, redefining stigma to mechanically exclude charges of incompetency, irrespective of superficial designation or actual stigmatizing effect.

Hadley v. County of DuPage, 715 F.2d 1238 (7th Cir. 1983) summarizes the Seventh Circuit's treatment of stigmatizing incompetency charges,

> ". . . The Seventh Circuit has taken the position that a mere charge of mismanagement is not enough to give rise to a liberty interest requiring a hearing. 'We are satisfied that plaintiff has failed to state a claim under either branch of the *Roth* liberty test. An unelaborated charge of incompetence, neglect of duty and malfeasance of office is a different order of magnitude than charges of dishonesty, immorality, disloyalty, Communism, subversive activities, alcoholism or narcotics violations.' " (715 F.2d 1238, 1245)

Apparently the Seventh Circuit has equated the facial charge of incompetence as falling, regardless of factual setting, within this Court's warning in *Roth* that,

> "Mere proof, for example, that his record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employer would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty." (408 U.S. 564, 574, n.13)

Other circuits, however, have properly looked beyond simple designation to detect an actual stigma to a protected interest.

The Second Circuit was confronted with a fact pattern with identity to the petitioner's in *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2nd Cir. 1980). *Quinn* reviewed a public agency director who was discharged amidst publicity which created the public impression that the director was in some fashion responsible for missing agency funds. In responding to the claim that explicit charges of immoral and illegal conduct is necessary to stigma the requisite "liberty" infringing stigma, the court stated,

> "A subtle campaign designed by city officials to make plaintiff the scapegoat for an episode of municipal misfeasance may impose no less an indelible stigma than a public proclamation announced at high noon from the steps of City Hall. Indeed, a carefully conceived scheme of suggestion and innuendo may be all the more devastating to individual liberty because it is more difficult to refute, especially when its architects sit in the highest offices of local government." (613 F.2d 438, 447)

The Fourth Circuit similarly lends its voice to the appropriate analysis of charges of incompetency in *Cox v. Northern Virginia Transportation Commission*, 551 F.2d 555 (4th Cir. 1976). *Cox* concerned an employee who was discharged amid allegations of financial irregularities in the handling of expense accounts. The court comments,

> "The commission defends on the ground that there is no proof that its officers expressly told reporters that Mrs. Cox was dishonest or immoral. It says that, instead, the reporters were told that she was incompetent and failed to establish good relations with the staff. These comments, however, did not dispel the effect of the commissioners' published statements linking Mrs. Cox's discharge to the investigation of financial irregularities. Nor did the absence of formal charges of wrongdoing lessen the injury to her reputation that was caused by the interviews the commissioners granted the press. The opportunity of a discharged public employee to get a new job may be hampered as badly by official leaks to the press insinuating dishonesty as by a published official reprimand. In either event, therefore, the employee is entitled to a hearing." (551 F.2d 555, 558)

McKnight v. Southeastern Pennsylvania Transportation, 583 F.2d 1229 (3rd Cir. 1978) lastly describes the Third Circuit's analysis when presented with an attempt to exempt incompetence charges from the purview of stigma.

Pertinently, an employee had been discharged for "an isolated incident of intoxication (which) reflects intemperance and *unsatisfactory job performance*" (emphasis added) (583 F.2d at 1236). The court stated,

> . . . defendants submit that allegations of harm to reputation resulting from discharge from public employment should be divided into two broad categories; those that involved charges pertaining to the employee's performance on the job itself, and those that ascribe to the employee some broad "status" beyond that necessarily entailed in the job. The idea underlying this suggestion is that only statements of the second sort rise to the level of a deprivation of a person's "liberty." . . .

continuing,

> . . . The alternative to the defendants' suggestion of categorizing different situations is, inevitably, to focus on the particular facts of a specific case in ascertaining whether the cited harm to reputation and employment prospects has actually resulted from the employer's charge. Such concentration on the *facts* of the case at hand is reflected clearly in Supreme Court decisions dealing with claims of a deprivation of "liberty" flowing from discharge from employment. (emphasis added) (583 F.2d 1229, 1237)

See also Fitzgerald v. Mountain Laurel Racing Inc., 607 F.2d 589 (3rd Cir. 1979).

The foregoing appellate cases clearly demonstrate that the assignation of incompetence or similar job performance label, standing alone, does not render otherwise stigmatizing behavior immune from "liberty" interest scrutiny. Equally plain is their need to examine the totality of facts attendant such a discharge to determine whether a stigma has, in fact, been effected. Had such a review been performed instantly, where the totality of facts sur-

rounding incompetence involved highly charged allegations and insinuations of theft and narcotics violations; it is respectfully submitted, that a meritorious infringement of liberty, would have been found.

Two circuits have adopted the Seventh Circuit's extenuated position excluding incompetence charges from a liberty analysis.

Debose v. United States Department of Agriculture, 700 F.2d 1262 (9th Cir. 1983) reveals the Ninth Circuit's constrained reading of this Court's decision in *Roth*. The Court claims that absent a charge of dishonesty or immorality, no serious damage to an individual's standing can be shown. *Accord Stretten v. Wadsworth Veterans Hospital*, 537 F.2d 361 (9th Cir. 1976). *Roth*, however, offers no such limitation; dishonesty and immorality were simply cited as *examples* of a stigma, not a definition.

Mazaleski v. Treusdell, 562 F.2d 701 (D.C. Cir. 1977) similarly reflects a narrow view of *Roth*, delimiting stigma to charges of dishonesty, immorality, degradation or unsavory conduct. Again *Roth* imposes no such restrictive standard.

Arguably, the Tenth Circuit, in *Stritzl v. United States Postal Service*, 602 F.2d 249 (10th Cir. 1979) adopted a similarly restrictive view of *Roth*, yet this same court's divergent view in *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983), where a stigma was found from charges of poor job performance, offers a more thorough and recent insignt into that Circuit's position.

In deference to the described cases of this Court and subsequent appellate cases of the Second, Fourth and Third Circuits, petitioner urges that he has fully met the necessary criteria outlined by this Court in stating an infringed liberty interest. Petitioner submits that the

Seventh Circuit's reading of *Roth*, so as to exclude stigmatizing incompetency charges, cannot be logically squared with a reasoned reading of liberty. Accordingly, petitioner asks this Court to exercise its supervisory power to redress the resulting imbalance that has developed amongst the appellate courts by reversing the judgment entered below and remanding this action for trial.

II.

PETITIONER'S CONSTITUTIONALLY PROTECTED "PROPERTY" INTEREST IN CONTINUED EMPLOYMENT, ONCE CREATED, CANNOT BE ABROGATED BY STATE STATUTE.

There can be no serious dispute that petitioner received a protected property interest in his employment by virtue of a provision of the Illinois Metropolitan Transit Authority Act.

> . . . No officer or employe shall be discharged or demoted except for cause which is detrimental to the service. Any officer or employe who is discharged or demoted may file a complaint in writing with the Board within ten days after notice of his or her discharge or demotion. (Ill. Rev. Stat., ch. 111⅔, sec. 328)

Specifically, this provision provides that discharged employees of the CTA can only be discharged for cause and shall be given a hearing if an appropriate complaint is filed. Accordingly, the requisite "property" entitlement is present. See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

Since the petitioner was represented in a collective bargaining agreement by Div. 241, the petitioner elected to have his post-termination hearing in the form of a grievance arbitration pursued by Div. 241. However, this arbi-

tration was limited in its scope of issues and the courts below did not find that this arbitration was a bar to a federal proceeding.

Further, petitioner's property rights to employment entitled him to a due process hearing prior to the CTA taking any action against him which would involve a substantial property interest such as employment. See *Cleveland Bd. of Educ. v. Loudermill*, 84 L.Ed.2d 494 (1985). The petitioner was discharged without a pretermination hearing.

It is not disputed that the CTA had the right to establish or abolish any security force it may choose to create.

> . . . In the policing of its properties the Board may provide for the appointment and maintenance, from time to time, of such police force as it may find necessary and practicable . . . (Ill. Rev. Stat., ch. 111⅔, sec. 327)

However, the employees of any CTA security force must continue to enjoy a property interest to continued employment in any other jobs for which they could qualify.

> . . . The Board may reduce any office or reduce the force of employes for lack of work or lack of funds, but in doing so the officer or employe with the shortest service record in the class and grade to which he or she belongs shall be reinstated in order of seniority when additional force of employes is required. Seniority shall be considered a working condition and where employes are represented by a labor organization which has any labor agreement with the Authority such working conditions shall be governed by the terms of such agreement. (Ill. Rev. Stat., ch. 111⅔, sec. 328)

Plainly, the petitioner had a right to continued employment which should have been accomplished by placing the

petitioner on a recall list. CTA should have attempted to place the petitioner in the next available job for which he could qualify. Contrary to the CTA's representations to the Court of Appeals, the petitioner has not been placed on a recall list at any time since the abolishment of the security department.

Any conflict between the CTA's right to reduce the work force and petitioner's property right to continued employment must be resolved in favor of the petitioner since reasonable reassignment procedures are specified in the state statute.

In deference to the foregoing, it is respectfully submitted that the petitioner has a constitutional property interest in continued employment with the CTA which warrants a reversal of the court below and a trial on the merits.

III.

PETITIONER'S RIGHT TO SUE UNDER SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964 AS AMENDED [49 U.S.C. SECTION 13(c)].

The petitioner's request that the court direct the U.S Secretary of Labor to withhold federal funds from the CTA for violations of his federally guaranteed employee job protection rights was denied by the court below based on *Jackson Transit Authority v. Transit Union*, 457 U.S. 15 (1982).

Div. 241, which represented the petitioner in a 13(c) Agreement to which the CTA was a party, never took any action to negotiate, mediate, or arbitrate the petitioner's rights under the 13(c) Agreement.

The right to sue in federal court is governed by: existence of a special class under the statute, the remedy

underlying the purpose of the legislative scheme, the legislative history of the statute, and whether there is an appropriate remedy available in state court. See *Cort v. Ash*, 422 U.S. 66 (1975).

The Urban Mass Transportation Act did create a special class to receive federal aid, namely, mass transportation systems. Petitioner as an employee of a federally funded mass transportation system was a member of that special class. The purpose of the legislative scheme was to fund mass transportation systems subject to employee protection provisions in section 13(c) but no specific remedy was stated. The legislative history of UMTA indicates that transit labor organizations would be expected to pursue their members' rights under state remedies.

No conflict with possible state remedies exists in the petitioner's instance since Div. 241 never pursued an arbitration under the 13(c) Agreement. Petitioner is basing his right to sue on the language of section 13(c).

Neither the U.S. Secretary of Labor nor the U.S. Secretary of Transportation have any administrative procedures to handle an administrative complaint for violations of section 13(c).

Section 13(c) clearly states that the federal rights identified there accrue to "individual employes". Since the preferred state remedy was not afforded to the petitioner by his labor organization and there is no federal administrative remedy, the petitioner has no other recourse but to approach the federal courts for a remedy. The Court has left open the possibility of some instances of a federal remedy. See *Jackson Transit Authority, id.*, at footnote 13.

In consideration of these special circumstances, the petitioner should have a right to sue in federal court to seek

a remedy for violations of section 13(c). It is requested that this Court clarify the petitioner's right to sue for the instruction of the courts below.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests this Court to grant his petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Dated: February 12, 1986

APPENDIX A

[UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT RULE 35]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued October 29, 1985

November 15, 1985

Before

Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*

TIMOTHY O'MAHONY, et al.,

Plaintiffs-Appellants,

No. 85-1609 vs.

CHICAGO TRANSIT AUTHORITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 5543—**John F. Grady**, *Judge.*

ORDER

We affirm the district court's judgment for the reasons stated in that court's two opinions, which we attach. We add only that the Due Process Clause of the Fourteenth

Amendment does not require personal hearings for systemic changes. When the government abolishes a program for benefits—here abolishes the security department of the Chicago Transit Authority—that is a legislative decision for which personal hearings are both unnecessary and unsuited. *Atkins v. Parker*, 105 S. Ct. 2520, 2529-30 (1985). The remedies for changes in governmental programs are political, not judicial. The plaintiffs have since been reemployed as a result of an agreement with those who bear political responsibility. The political forum was the right one all along.

AFFIRMED

Ripple, *Circuit Judge*, concurring:

I concur in the judgment of the court since I believe that the district court properly disposed of the contentions of the appellants.

I also concur—although with great reluctance—in granting the motion of the appellants that we accept the filing of the briefs which do not conform to our rules. The judges of this court are far too busy to contend with material of this sort. Counsel has an obligation both to this court and to his clients to submit material that will aid—not impede—the decision-rendering process.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMOTHY O'MAHONY, et al.,

Plaintiffs,

No. 82 C 5543 v.

THE CHICAGO TRANSIT AUTHORITY, et al.,

Defendants.

ORDER

Count I of this action is brought under 28 U.S.C.A. § 1331(a) and 49 U.S.C. § 13(c), the Urban Mass Transportation Act of 1964. Plaintiffs' claim, basically, is that they were discharged in violation of their "§ 13 agreement." Under § 13 of the Urban Mass Transportation Act of 1964, a state or local government must make arrangements to preserve transit workers' existing collective bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company.

Defendants have filed motions to dismiss Count I of this complaint on the ground that this court lacks jurisdiction over the subject matter.

We grant defendants' motions to dismiss Count I. In *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC,* ___ U.S. ___, 102 S. Ct. 2203 (1982), the Supreme Court made it clear

that § 13(c) does not create federal causes of action for breaches of a § 13(c) agreement or collective bargaining contracts between Urban Mass Transit Act aid recipients and transit unions. As the Court held, the legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts. Therefore, we have no jurisdiction over the claims asserted in Count I of plaintiffs' complaint.

Count II of plaintiffs' complaint seeks relief under 42 U.S.C. § 1983, alleging deprivation of their civil rights under color of law. Defendant Chicago Transit Authority also moves to dismiss Count II on the ground that it fails to state a claim for deprivation of constitutional rights. Since materials outside of the pleadings have been submitted by the parties and considered by the court, we treat this as a motion for summary judgment. *See* Fed. R. Civ. P. 12(b)(6).

Plaintiffs first argue that they had a property interest in their jobs and therefore could not be dismissed without cause. Ill. Rev. Stat. ch. 111⅔, § 328 provides that discharged employees of the Chicago Transit Authority can only be discharged for cause and must be given a hearing if a complaint is filed within 10 days of the discharge. This, however, is not the provision which governs this situation. In our case the Transit Authority totally eliminated the plaintiffs' job position. Under Ill. Rev. Stat. ch. 111⅔, § 327, the Transit Authority has the authority to maintain a police force "from time to time as it may find necessary." We conclude that defendant Chicago Transit Authority was exercising its statutory right to abolish the security force and that plaintiffs did not have a property interest in their jobs. *Accord Woolfolk v. Board of Fire and Police Commissioners of the Village of Robbins*, 79 Ill. App.3d 27, 398 N.E.2d 226 (1st Dist. 1979) (statute permitting the abolition of the police force controlled, rather than the provision providing for discharge for cause).

Plaintiffs also attempt to argue that they had a property interest in their jobs as a result of an agreement reached with a former chairman of the Chicago Transit Authority. This matter was raised in an arbitration proceeding subsequent to the termination of plaintiffs' jobs and was also the subject of one of the arbitrator's findings. The arbitrator found that the agreement to which plaintiffs refer applied to layoff policies and was not applicable where they were permanently terminated. This finding is now binding and final as between the parties, *see Amoco Oil Co. v. Oil, Chemical & Atomic Workers International Union, Local 7-1, Inc.*, 548 F.2d 1288, 1293-93 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977); *Johnson v. Agar Products Co.*, No. 81 C 2983, slip op. at 6 (N.D. Ill. Oct. 29, 1981) (Getzendanner, J.). Therefore, we have no basis for concluding that plaintiffs had a property interest in their jobs as a result of this alleged agreement.

We do hold, however, that plaintiffs have stated a claim for deprivation of a constitutional liberty interest without due process of law. Plaintiffs' complaint sets forth that two weeks prior to their termination they were subjected to serious public allegations of malfeasance and criminal conduct by members and officers of the Chicago Transit Authority Board. As we held earlier in *Holly v. City of Naperville*, No. 82 C 6981, slip op. at 13 (N.D. Ill. July 8, 1983) (Grady, J.), "stigma to reputation, when found in conjunction with discharge . . . raises a constitutional liberty interest which may not be abridged without notice and a hearing sufficient to give the aggrieved party a chance to clear his name." *See also Colaizzi v. Walker*, 542 F.2d 969, 973 (7th Cir. 1976), *cert. denied*, 430 U.S. 960 (1977).

CONCLUSION

For the reasons stated above, we grant defendants' motion to dismiss Count I of the complaint and dismiss that portion of Count II of the complaint which seeks relief for deprivation of a property interest without due process. The sole remaining claim in this complaint is plaintiffs' claim alleging deprivation of a constitutional liberty interest without due process of law.

DATED: 30 AUG 1983

ENTER: /s/ JOHN F. GRADY
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TIMOTHY O'MAHONY, et al.,

Plaintiffs,

No. 82 C 5543 v.

THE CHICAGO TRANSIT AUTHORITY,

Defendant.

MEMORANDUM OPINION

Plaintiffs, formerly security guards employed by the Chicago Transit Authority ("CTA"), claim that their right to due process was violated when defendant CTA failed to give them a hearing after making stigmatizing statements in the course of their discharge.[1] The case is before us on defendant's motion for summary judgment. For the reasons given below, defendant's motion is granted.

FACTS

The CTA fired plaintiffs on September 29, 1981. The complaint states that the official reasons given to plaintiffs for their discharge were lack of funding and ineffective job performance. Complaint, ¶ VI. At the time of discharge, Mayor Jane Byrne was quoted in newspapers as complaining of "inadequate" security. Specifically, she blamed the CTA's security force for allowing "crime hazards and drug abuse on buses and trains, fraudulent misuse of transfers and widespread equipment theft." De-

fendant's Motion for Summary Judgment, Attachment # 27, *Fire CTA Cops: Bryne*, Chicago Sun-Times, September 29, 1981, at 1, col. 1.[2] Police Superintendent Richard Brzeczek was quoted as calling the force a "wasteful, ineffective system run by people who don't know what management control means." *Id.*, Attachment # 5, *Brzeczek Blasts CTA Security Force*, Chicago Tribune, October 4, 1981, at 3, col. 2.

DISCUSSION

The CTA claims that the above assertions allegedly made by Mayor Byrne and Police Superintendent Brzeczek were not stigmatizing, because the statements accused plaintiffs of incompetence, not dishonesty. Moreover, the CTA states that because the statements were directed toward the security force as a whole, and not toward particular individuals, the statements are in any event not actionable. We agree that the statements about which plaintiffs complain are not stigmatizing.

Under the Constitution, a public employee is entitled to procedures safeguarding his liberty interest. This interest encompasses "1) protection of his good name, reputation, honor and integrity and 2) his freedom to take advantage of other employment opportunities." *Hadley v. City of DuPage*, 715 F.2d 1238, 1244 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 1000 (1984). Therefore, an employee is entitled to a hearing to clear his name if, in the course of discharging him, the government makes charges against the employee that "might seriously damage his standing and associations in his community." *Munson v. Friske*, No. 83-1446, slip op. at 13 (7th Cir. Jan. 29, 1985).

The Seventh Circuit has described statements coming within the ambit of an employee's liberty interest as charges of "immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts;" *id.* at 14, or charges of "dishonesty or other job-related moral turpitude." *Lawson v. Sheriff of Tippecanoe County, Indiana*, 725 F.2d 1136, 1138-39 (7th Cir. 1984). Liberty is not infringed "by a label

of incompetence or a failure to meet a specific level of management skills." *Munson*, slip op. at 14; *Hadley*, 715 F.2d at 1285; *Holly v. Naperville*, No. 82 C 6981, Memorandum Op. at 9-10 (N.D. Ill. Feb. 7, 1985) (Grady, J.).

All the comments attributed to government officials in the newspaper articles submitted by all parties accuse the security force as a whole of incompetence. Even plaintiffs have characterized the comments as "implying that [plaintiffs were] *either* dishonest *or* incompetent." Plaintiffs' Response for Motion of Summary Judgment at 1 (emphasis supplied). In none of these articles is an official quoted as accusing any member of the force of criminal acts; rather, officials allegedly accuse the force of failing to *curb* illegal conduct. *See infra* at 1, 6 n. 1. Therefore, following *Munson* and *Hadley*, the statements did not stigmatize the plaintiffs.

Plaintiffs argue that these articles "implied collusion" in criminal acts. Plaintiffs' Response at 1. We disagree, keeping in mind that in determining the merits of the motion for summary judgment, we must draw inferences from the evidence in the light most favorable to plaintiffs. In two articles submitted by plaintiffs, a city official is quoted as explicitly stating, "I'm not accusing anybody of stealing." Plaintiffs' Response, Attachment, *2 find mess of $1 bills at CTA counting house*, Chicago Sun-Times, July 15, 1981, at 1, col. 3, 26, col. 1; *id.*, *Dollar Surfeit Seizes Chicago Transit*, The New York Times, July 17, 1981, at A10, col. 2.

Judge Kocoras confronted this exact fact situation in *Arnold v. Byrne*, No. 82 C 5240, Transcript of Proceedings (N.D. Ill. May 25, 1984). There, non-union employees of the security force complained about the same statements that plaintiffs, union employees, complain of here. After reviewing some of the same newspaper articles as were submitted here, Judge Kocoras concluded that statements attributed to Mayor Byrne did not stigmatize:

> The Mayor essentially accused the CTA's Security Department of being incompetent: By their ineffective-

> ness they had failed to curb various types of criminal activity. This is, in my judgment, the only logical and fair conclusion and reasonable conclusion to be drawn from the summary of the Mayor's words set forth in . . . the two incorporated newspaper articles.

Arnold, Transcript at 3.

Plaintiffs attempt to distinguish their situation from that found in *Arnold* by claiming that the non-union employees in *Arnold* were investigators and "spotters" and did not actually participate in "the guard function." Plaintiffs' Response at 2. In other words, plaintiffs argue that statements made by city officials were leveled at persons other than the plaintiffs in *Arnold*. *See id.* Whether this claim is true is irrelevant. Judge Kocoras found that the statements, whomever they concerned, were not stigmatizing. We agree.[3] Because these statements do not accuse plaintiffs of dishonest or immoral conduct, plaintiffs' liberty interest was not affected, and they were not entitled to a due process hearing after their discharge.[4]

The court in *Arnold* asserted another reason for dismissing the employees' claim:

> The fact that Mayor Byrne may have wrongfully accused a large group also patently distinguishes the present case from all others cited by plaintiffs, in which one or two persons were singled out for public criticism. Any stigmatic effect her words might otherwise be construed to have had was diluted by the fact that they were issued broadly at a large and undifferentiated group.

Arnold, Transcript at 4. Here, plaintiffs admit that "it is true that no single person was actually charged." Plaintiffs' Response at 1.

We are not so sure that in no case could an individual assert his liberty interest when stigmatizing statements are made in reference to a group. It may be that statements could be so damaging that even taking into account a certain dilution due to their direction at a group, the

statements could seriously hinder an individual from finding employment. This, however, is not such a case. Any damage from statements made by city officials here was sufficiently diluted so as not to implicate an individual plaintiff's liberty interest.

CONCLUSION

For the reasons given above, we find that the statements about which plaintiffs complain were not stigmatizing and did not implicate plaintiffs' liberty interest. Therefore, defendant's motion for summary judgment is granted, and plaintiffs' action is dismissed.[5]

DATED: MAR 12, 1985

ENTER: /s/ JOHN F. GRADY
United States District Judge

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[1] Plaintiffs' original complaint also included claims based on 28 U.S.C. § 1331(a), 49 U.S.C. § 13(c), and plaintiffs' property interest in employment. These claims were dismissed, leaving plaintiffs' liberty interest claim, discussed *infra*. O'Mahoney v. The Chicago Transit Authority, No. 82 C 5543 (N.D.Ill. Aug. 30, 1983) (Grady, J.).

[2] *See also* Defendant's Motion for Summary Judgment, Attachment # 1, *CTA union says Byrne slandered it, vows suit*, Chicago Tribune, Sept. 29, 1981, at 1, 18 (Byrne claims security force "had not curbed" sale of drugs, illegal sale of transfers and theft); *id.*, Attachment # 3, *CTA votes down rehiring of guards*, Chicago Sun-Times, Oct. 20, 1981 (Byrne "angrily ordered the firings, saying the workers were incompetent"); Plaintiffs' Response, Attachment, *Barnes asks bank to count CTA money*, Chicago Tribune, July 16, 1981, at 5, col. 1 (director of Byrne's Office of Municipal investigation claims security "lax;"); *id.*, *2 find mess of $1 bills at CTA counting house*, Chicago Sun-Times, July 15, 1981, at 1, col. 3, 26 col. 1 (director complains of "serious lack of security").

[3] Plaintiffs have asserted that after their discharge numerous acquaintances believed that they had been fired for theft and dishonesty, and that their children and wives were harassed by similar comments. Plaintiffs' Response, "Affidavits" (These statements, purporting to be affidavits, do not appear to have been

sworn to in front of an officer having authority to administer oaths).

The issue here is not whether the public inferred from news articles that plaintiffs committed dishonest acts. Rather, the issue is whether a reasonable person could construe *from statements made by government officials* that plaintiffs committed such acts. Comments attributed to city officials have been cited, *supra* at 1, 6 n. 1. We make our inferences from those comments only. Even making inferences in the light most favorable to the plaintiffs, we agree with Judge Kocoras and cannot conclude that a reasonable person could believe from these comments that the government was accusing plaintiffs of dishonest acts.

[4] In their response, plaintiffs also complain about a statement published in the Chicago Sun-Times. In reference to the statement, plaintiffs argue:

> It is clear that the defendant . . . engaged in a deliberate and premediated campaign to discredit and defame the security department. . . . The comment taken out of context in quoting Timothy O'Mahony is a small example of how [defendant] is trying to manipulate the facts. The remark was clearly intended to be fascitious [sic] with emphasis on the word "supposedly." The volume and nature of the comments clearly indicate that [defendant] had a clear and deliberate plan of defamation and termination of the security function.

Plaintiffs' Response at 2.

We assume that the statement to which the plaintiffs refer is a letter to the editor of the Sun-Times purportedly signed by plaintiff O'Mahony. *Letters: Look who's talking about CTA security now,* Chicago Sun-Times, Feb. 12, 1982. This letter reads:

> Yet it was Byrne who only four months ago fired the supposedly incompetent CTA security department, charging that it had let crime get out of hand.

This statement does not implicate plaintiffs' liberty interest for numerous reasons. First, it does not accuse the plaintiffs of dishonest conduct. Second, the letter supposedly was written by a plaintiff, not a city official. Third, if any alteration or fabrication occurred in the publication of this letter, this manipulation must have been perpetrated by the Sun-Times, not the government. There is no evidence, and the plaintiffs do not claim, that any city official participated in publication of the letter. Clearly, the plaintiffs cannot complain about statements attributed by a newspaper to a plaintiff, especially when the statements are non-stigmatizing.

[5] We had granted defendant leave to file a reply brief, but we were able to decide the motion without it.

APPENDIX D

[Chicago Sun-Times — Sept. 29, 1981 — p. 1]

Fire CTA cops: Byrne

By Harry Golden Jr.

Mayor Byrne Monday moved to fire the entire 106-member security force of the CTA and turn its job over to the Police Department.

An angry Byrne revealed that she wants the CTA to scrap the force, which she blamed for crime hazards and drug abuse on buses and trains, fraudulent misuse of transfers and widespread equipment theft at CTA shops.

Firing of the force was expected to be carried out Tuesday by an administrative order from CTA Executive Director Theodore Schuster.

"Senior citizens are afraid to ride the CTA and that's terrible," Byrne told City Hall reporters. "I hope the rest of the units understand this is how it's going to be throughout the CTA. The heyday on the CTA is over. . . . We're housecleaning and

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[Chicago Sun-Times, Tuesday, Sept. 29, 1981 — p. 8]

Byrne moves to dismantle CTA's security force

Continued from Page 1

there's going to be more."

Byrne said her decision was made in a meeting with Schuster and Police Supt. Richard J. Brzeczek.

Also present and concurring, she said, were James A. Maurer, director of the Office of Municipal Investigations; Michael Cardilli, Schuster's deputy; Howard C. Medley, a CTA board member, and Michael G. Ferreri of the CTA consulting firm of Simpson & Curtin.

ASKED ABOUT HER ORDERS to Brzeczek, Byrne said, "I want him to clean it up, period. I want people to be able to ride in comfort and not feel threatened."

For many years, the CTA security force has been primarily responsible for guarding CTA garages, shops, counting houses and other installations. Only rarely have the guards been called upon to patrol CTA routes. Instead, the Police Department has maintained a mass transit unit.

Byrne mentioned the plan for disbanding the force as she spoke Monday afternoon to residents of Lawrence House, a retirement hotel at 1020 W. Lawrence. She then spoke by telephone to reporters in the City Hall press room.

She said she had arranged for a special session of the CTA board at 3 p.m. Tuesday to act on her recommendation.

LATER, HOWEVER, A CTA spokesman said the meeting was canceled because research showed Byrne's will can be carried out by an executive order from Schuster, without board action.

City police took over some security force functions Monday night, said CTA Sgt. Frederick E. Barrett, who was working what may be one of his last night shifts for the CTA. He said CTA security employees at bus depots were pulled off their assignments at 6 p.m. and replaced by 12 city policemen.

Byrne said she had received reports of recent thefts of 26 tires, a quantity of batteries and some fire extinguishers from CTA shops. At the CTA's counting house, she said dollar bills collected as fares are scattered about amid lax security.

Moreover, she said, she's been informed that marijuana is routinely sold at various CTA stations. She asserted she will stop "the pushing of drugs, the selling of drugs and the using of drugs on the CTA."

THERE ALSO HAS BEEN flagrant abuse of transfers, she said, explaining that riders who don't need connecting transportation frequently buy the 10-cent transfer coupon and then resell it.

Byrne's charges were called "very unfair" by Timothy O'Mahony, a veteran member of the security force. "I have to say this is political," he said. "Every politician needs a scapegoat."

Most of the targeted employees are members of Amalgamated Transit Workers Union Local 241, the same union that represents bus drivers. Byrne said union membership will be no hindrance to dismissal.

The 65 security employees who are union members wear uniforms and are called security officers. The others, who wear civilian clothes, are called investigators. A CTA spokesman said members of the force are officers of the law with powers of arrest.

SOURCES WITHIN THE CTA estimated the employees' annual salaries average $22,500, which would indicate a payroll of $2.4 million.

Byrne said police would promptly take over all the force's functions, but watchman duties at outlying installations would eventually be turned over to a private security service.

For the rest of this year, Byrne said, the realignment of security will result in a saving of $350,000. Apparently, the figure represented a net difference in costs of the existing service compared to service by police.

APPENDIX E

[Chicago Tribune — Oct. 4, 1981 — Sec. 1, p. 3]

'Wasteful, ineffective'

Brzeczek blasts CTA security force

By Lynn Emmerman
and David Young

AN AUDIT OF the recently disbanded Chicago Transit Authority security force has shown it to be a "wasteful, ineffective system run by people who don't know what management control means," Chicago Police Supt. Richard Brzeczek said last week.

In an interview with The Tribune, Brzeczek discussed the failings of CTA security and outlined his plan to clean up the transit system.

"We have to start from scratch before we can even begin to determine how bad the employe theft problem is," Brzeczek said. He said CTA security had virtually no procedures to check up on suspicious "L" train fare collectors and bus drivers, and had no plan to monitor the distribution of the CTA's consumable supplies like gasoline and transfers.

"We have good reasons to believe that employes have been skimming fare monies as well as stealing transfers and other supplies and reselling them on the street," Brzeczek said.

THE AUDIT disclosed other problems that plagued the transit security force, including "misassignments of officers." This resulted in inadequate security protection in crucial areas such as CTA fare-counting headquarters, which handles an average of $700,000 a day, and heavy security at other, less valuable CTA properties such as storage garages, he said.

The police department began an ongoing audit of CTA security Monday after Mayor Byrne moved to eliminate the 106-member transit security force and transfer its responsibilities to the police department.

Brzeczek said he welcomed the extra responsibilities but that he expects the CTA to pay for the police-provided security. He said the CTA should reimburse the police department much in the same way that the airlines pay for the flight screening officers assigned to O'Hare International Airport.

THE YEARLY cost for police-provided security at O'Hare is $1.5 million. The cost for transit security and the number of officers to be assigned to the new transit unit has not yet been determined, he said.

The police department's new responsibilities, formerly those of the CTA security force, include guarding CTA buildings, protecting money counting islands and the central counting facility, responding to transit traffic accidents, and riding the system to check for problems.

Protection of CTA riders always has been the responsibility of the police mass transit unit. Police sources said that mass transit officers who allegedly neglect their duties are currently under investigation as part of the department's plan to clean up the transit system.

ACCORDING TO Brzeczek, other points of the plan include:

- The installation of surveillance cameras in 10 "L" stations on the Howard-Englewood line by May, 1982. The cameras, which are equipped with two-way speakers and push button phones, are monitored by police at communications headquarters. They currently are operating in four South Side el stations as part of a pilot program. The CTA board voted to install the additional cameras last year.
- A streamlined emergency communications system for bus drivers and "L" train motormen. Their emergency calls for police aid now must go through four CTA controllers before police are notified. The new system will locate the vehicle in trouble and notify the proper police

communications dispatcher in two simple steps, cutting police response time in half.

- Hiring bonded CTA workers who will handle fare box money and free security officers for more agressive patrol activities.
- Establishing a procedure to make transit employes accountable for their use of CTA supplies. Brzeczek said that this should stop the "hot transfers that are flooding the street."

POLICE AND the Office of Municipal Investigations are investigating complaints that transit employees are running gambling operations and selling and using narcotics on CTA property. In several cases, the complaints appear substantial and could result in indictments, said OMI Director James Maurer.

One high-ranking CTA official, who asked not to be identified, voiced skepticism about Brzeczek's plan.

"I don't see how this changeover will help the CTA. We have enough financial troubles as it is without having to pay the Chicago police for a new transit security unit that's no more effective than the old one.

"The police department has had the unit only five days and already they've got trouble," he said, referring to reported vandalism of eight CTA bus fare boxes in the Lawndale Depot late Thursday and early Friday. The incident was the first reported property crime against CTA property since the police took over transit security.

Brzeczek said the police were well on their way to solving the fare box breakins and added, "There's nothing wrong with expecting payment for our services to the CTA. They've always budgeted money for security. We're one goverment agency serving another. I think asking for payment is a reasonable request."